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No. 118.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

HAMILTON S. WALLACE, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is an appeal from the judgment of the Court of Claims dismissing the petition of the claimant brought to recover the pay and allowances of colonel of the Quartermaster Corps of the United States Army for the period from February 13, 1918 to March 12, 1919, amounting to $6,508.71. (Finding, VII.)

The claimant was duly commissioned as colonel in the United States Army on April 26, 1912, and he served as such an officer and received the pay of this office until February 13, 1918. (Findings I and III.) On February 13, 1918, in time of war, the claimant was notified that the President had, by General Orders No. 17, dated February 13, 1918, dismissed claimant from the service. (Finding IV.)

On March 1, 1918, the President nominated to the Senate as colonels in the Quartermaster Corps of the Army—

> Lt. Col. Robert S. Smith, Quartermaster Corps, with rank from February 14, 1918.
>
> Lt. Col. Richmond McA. Schofield, Quartermaster Corps, with rank from February 23, 1918.

These officers were confirmed by the Senate on March 8, 1918, and their appointment filled the complement of twenty-one (21) colonels which the law authorized in the Quartermaster Corps. (Finding IV; sec. 9 act of June 3, 1916, 39 Stat. 166.)

On July 16, 1918, the claimant made application in writing for trial by court-martial on the ground that he had been wrongfully dismissed from the service. This application was received by The Adjutant General of the Army on August 5, 1918. On September 14, 1918, the claimant's application for trial was refused by the Secretary of War and the claimant was so informed. No court-martial has been convened at any time to try the claimant upon the charges upon which he was dismissed. (Finding V.)

The claimant's petition rests upon the theory that his dismissal by the President was rendered void by virtue of the provisions of section 1230, Revised Statutes, which section is taken from section 12 of the act of March 3, 1865, 13 Stat. 489. Section 1230 provides:

> When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

As an answer to the position of the claimant, the contentions of the Government are:

(1) That the claimant was dismissed by the action of the President in appointing, with the approval of the Senate, an officer to supersede him, and section 1230, Revised Statutes, does not apply to such a dismissal.

(2) That even if the claimant's dismissal was subject to the provisions of section 1230, the claimant waived his rights under that section by his delay in applying for trial by court-martial.

(3) That even where section 1230 is applicable, it does not give an officer dismissed by the President any right to pay after the date of his dismissal.

ARGUMENT.

I.

Section 1230, Revised Statutes, does not apply to the claimant's dismissal.

A. *The section does not apply to an officer dismissed by the action of the President in appointing, with the approval of the Senate, his successor.*

From a very early date it has been recognized that the power of removing Federal officers is incident to the power of appointing them, and that the President can, with the consent of the Senate, remove officers whom the Constitution authorizes him to appoint with the consent of that body. (*Ex Parte Hennen*, 13 Pet. 230, 259.)

In *McElrath* v. *United States*, 102 U. S. 426, this court squarely held that the act of the President in appointing, with the consent of the Senate, a new officer in place of one already in the service, dismissed the latter from the position which he held. This decision was followed in *Blake* v. *United States*, 103 U. S. 227; *Keyes* v. *United States*, 109 U. S. 336; *Mullan* v. *United States*, 140 U. S. 240. In *Blake* v. *United States* the court said, p. 237:

> It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the Army from and after, at least, the date at which that appointment took effect—and this, without reference to Blake's